Filed 4/15/03 City of Sacramento v. Superior court CA3

NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| CITY OF SACRAMENTO,<br><br>Petitioner,<br><br>v.<br><br>THE SUPERIOR COURT OF SACRAMENTO COUNTY,<br><br>Respondent;<br><br>MICHAEL MERAZ,<br><br>Real Party in Interest. | C042283<br><br>(Super. Ct. No. 01AS05241) |

The City of Sacramento (City) contests the trial court's order overruling its demurrer to Michael Meraz's first amended complaint. The City claims Meraz's action is barred by collateral estoppel and res judicata. It also argues the action must be dismissed due to Meraz's failure to submit a tort claim before filing the action. We issued an alternative writ, and

now grant the City's petition for relief on the basis of res judicata.

PROCEDURAL HISTORY

In June 2000, Meraz filed a first amended complaint against the City. He alleged the City terminated his employment as a police officer in 1998. Meraz appealed the City's decision to the City's Civil Service Board (Board). The Board denied his appeal. Meraz petitioned the trial court for a writ of mandate to set aside the Board's determination. The trial court denied his petition. He appealed the trial court's decision to this court. We affirmed the trial court's denial of his petition for relief.

During his appeal to the Board, Meraz alleges, an administrative law judge issued a decision precluding Meraz from conducting discovery and obtaining evidence regarding any discriminatory treatment by the City in connection with his termination. As a result, Meraz allegedly had not discovered and was not aware of any disparate treatment by the City in terminating him at the time of his administrative hearing. Disparate treatment was not raised or placed at issue at any time during his litigation. Portions of a transcript attached as an exhibit to Meraz's return document that the administrative law judge refused to allow discovery because he believed the issue of discrimination had not been raised by Meraz's appeal and was irrelevant.

After the Board denied his appeal, Meraz allegedly discovered the City had discriminated against him based on his

race by failing to follow policy, procedure and practice when the City investigated a complaint made against him, reviewed its disciplinary recommendations and, eventually, terminated him.

Meraz filed a complaint with the state Department of Fair Employment and Housing (DFEH), and received from it a "right to sue" notice. Meraz then filed his complaint against the City, claiming the City's alleged disparate treatment of him constituted (1) employment discrimination in violation of the Fair Employment and Housing Act (Gov. Code, § 12900 et seq. (FEHA)); and (2) unlawful discrimination based on race in violation of the California Constitution (Cal. Const., art. I, §§ 7, 31).

The City demurred to the complaint on numerous grounds. It demurred to the entire complaint, claiming Meraz as a matter of law was precluded by res judicata and collateral estoppel from again challenging his termination. It demurred to the constitutional cause of action on the grounds Meraz failed to file a tort claim with the City on a timely basis as required by the Tort Claims Act (Gov. Code, § 810 et seq.), Meraz failed to comply with the one-year statue of limitations, and Meraz could not recover damages for an alleged violation of his due process and equal protection rights pursuant to the California Constitution.

The trial court overruled the City's demurrer on all grounds. First, it determined neither collateral estoppel nor res judicata barred Meraz's complaint. Collateral estoppel did not apply because the issue of discrimination was not raised in

the earlier administrative hearing. Regarding res judicata, the trial court reasoned: "Although res judicata bars not only issues litigated, but also issues that could have been litigated, the Court declines to rule as a matter of law that race discrimination could have been litigated in the administrative hearing. As framed by the pleadings, that is a factual question that cannot be resolved on demurrer."

Second, it determined Meraz's filing of his complaint with DFEH obviated the requirement to file a tort claim with the City. Meraz's filing of the DFEH complaint also tolled the limitation period running on his constitutional cause of action.

The City petitioned this court for writ relief from the trial court's decision. We ordered an alternative writ to be issued and stayed further proceedings in the trial court.

BACKGROUND FACTS

As part of considering the City's demurrer, the trial court took judicial notice of the three previous adjudications arising from Meraz's termination: (1) the administrative law judge's proposed decision rejecting Meraz's appeal of his termination (*In the Matter of the Appeal of: Michael Meraz*, OAH No. N-1998100046, dated February 5, 1999, and ultimately adopted by the Board as its decision; "ALJ Decision"); (2) the trial court's denial of Meraz's petition for writ of mandate challenging the Board's decision (*Meraz v. City of Sacramento Civil Service Board*, Sacramento Super. Ct. No. 99CS00741, filed June 21, 2000, "Trial Court Decision"), and (3) the opinion of this court affirming the trial court's decision (*Meraz v. City*

*of Sacramento Civil Service Board,* Case No. C036553, filed November 5, 2001, "Appellate Court Decision"). We quote various portions of these decisions to explain the facts which underlie Meraz's termination and the litigation which arose from that.

"On October 25, 1996, Meraz [while on duty as a police officer employed by the City] issued a citation to 21-year-old Tiffany for running a red light.

"On Friday, December 13, 1996, Tiffany appeared in traffic court to fight the ticket. Meraz also appeared and informed the court that he had no independent recollection or notes about the matter. The court dismissed the citation.

"On Monday, December 16, 1996, an officer with the Internal Affairs unit of the Department called Tiffany in response to a voicemail message she had left over the weekend. Tiffany alleged that on December 13, 1996, she met Meraz, dressed in civilian clothes, outside the courtroom. She did not recognize him and he did not identify himself as an officer. They had a conversation, during which she asked him if he was married, thinking that her 32-year-old sister might be interested. She was surprised to discover afterward that he was the officer who wrote her ticket. Despite his claim in court that he could not defend the ticket, he told her afterward that he could have done so. He made clear that he wanted further contact with her in return for getting the ticket dismissed. He somehow obtained her work and home telephone numbers and called her at both places against her wishes.

"From December 19, 1996, to May 5, 1997, the police investigators did follow up interviews with Tiffany and Meraz and obtained additional evidence, including her home telephone answering machine tapes. In Meraz's interview, conducted with a police union representative present on his behalf, he gave an account that contradicted Tiffany's in all material respects. (In particular, he insisted that he had '[n]ever' called her at home. After her answering machine tape was played for him, however, he admitted that it was his voice on the tape.)

"On May 7, 1997, Meraz gave Internal Affairs a written statement to supplement his oral account.

"On May 19, 1998, the Department sent Meraz a letter giving notice of intent to terminate, based on the Department's conclusion that Tiffany's story was truthful and that Meraz had not only misbehaved toward her but had lied to Internal Affairs. The letter stated: 'Your actions constituted inefficiency, neglect of duty, insubordination, dishonesty, disobedience of a lawful rule, order or direction and caused impairment, disruption and discredit to your employment and the public service, and is cause for disciplinary action pursuant to Rule 12.2(c), (d), (e), (f), (p) and (w) of the Rules and Regulations of the Civil Service Board.' The letter also notified Meraz of his right to respond within 10 days.

"At some time thereafter, Meraz exercised his right to a *Skelly*[1] hearing on the proposed discipline. As a follow up to that hearing, he was interviewed once more by Internal Affairs, again with a representative present on his behalf, on July 22, 1998. (Before conducting this interview, the Internal Affairs investigators interviewed Sergeant Helen Gomez of the California Highway Patrol, with whom Meraz had claimed to have spoken at traffic court on December 13, 1996. Her records proved that she was not there on that date.)

"On September 2, 1998, the Department sent Meraz a letter of termination, stating the same grounds as the prior notice of intent to terminate.

"On January 6 and 7, 1999, following Meraz's appeal of the Department's decision, [Administrative Law Judge] Ann Sarli of the Office of Administrative Hearings conducted a hearing before the Board. Both Meraz and the City were represented by counsel. Meraz and Tiffany testified at length, as did other witnesses.

"On February 5, 1999, ALJ Sarli issued an extensive proposed decision, including 15 factual findings and 7 legal conclusions, affirming Meraz's termination." (Appellate Court Decision, pp. 5-7.) The ALJ Decision makes no mention of any argument or defense by Meraz based on alleged discriminatory treatment by the City during his termination.

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1 "*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 (*Skelly*)."

"On February 16, 1999, after a hearing at which counsel for both sides appeared and argued, the Board adopted the ALJ's proposed decision (with one slight modification).

"On February 29, 1999, Meraz filed a petition for writ of mandate in the superior court, seeking to have the Board's decision set aside and Meraz reinstated as a police officer.[2] Following the City's opposition and Meraz's reply, the trial court held a hearing on April 28, 2000. At the close of the hearing, the court rendered an oral ruling affirming the Board's action.

"On June 21, 2000, the court entered a judgment and order denying Meraz's writ petition. The judgment included a written rendition of the court's prior oral ruling." (Appellate Court Decision, pp. 7-8.) The trial court did not mention or rule upon any argument alleging discrimination by the City.

By an opinion dated November 5, 2001, we affirmed the trial court's denial of Meraz's petition for writ relief. We first determined substantial evidence supported the trial court's findings. Second, however, we responded to arguments raised by Meraz alleging a violation of due process and equal protection rights. We wrote: "Meraz contends that the delay in carrying out the investigation, and the 'biased and defamatory nature' of

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**2** "Meraz did not expressly argue that he should receive no discipline, conceding that it was 'inappropriate' and 'poor judgment' to have 'socializ[ed]' with Tiffany after her ticket was dismissed. (He has never conceded that he 'socialized' with her *before* the ticket was dismissed.)"

the investigation, violated his rights to due process and equal protection. (Emphasis and capitalization omitted.) Because this contention raises a question of law, we review it de novo. (*Silver v. Los Angeles Metropolitan Transportation Authority* (2000) 79 Cal.App.4th 338, 348.) We conclude that Meraz has shown no violation of due process or equal protection.

"Meraz appears to contend that the time lapse of a year and a half between Tiffany's complaint and his receipt of the Department's letter of intent to terminate somehow establishes a violation of due process. In his opening brief he cites no statute or case on point, however. The only cases he cites are criminal cases. He fails to show that the time rules followed in criminal proceedings apply to internal police investigations or that any particular time lapse in such an investigation ipso facto violates due process. A legal proposition asserted without apposite authority is waived. (*People v. Gidney* (1937) 10 Cal.2d 138, 142 [disapproved on another point in *People v. Hutchinson* (1969) 71 Cal.2d 342, 347].)[3]

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3 "Meraz's citation in his reply brief of Government Code section 3303 (stating general rules for conduct of investigations of public safety officers) and *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, which construes that statute, comes too late. We do not consider points raised for the first time in a reply brief unless the appellant shows good cause for not raising them sooner. (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) No good cause has been shown.

"In any event, Government Code section 3303 prescribes no time limits for the conduct of an investigation, and nothing cited by Meraz reads any time limits into that provision."

"Apart from the claim of undue time elapsed, Meraz offers no intelligible argument that the investigation was so mishandled as to deny him any constitutional right. (Despite his claim of an equal protection violation, he makes no argument going to equal protection.) In any event, he had every opportunity to put all evidence favorable to him before the Board and the trial court, and he does not argue that the Board or the trial court wrongly refused to consider any evidence he offered. Thus, even if we assumed for argument's sake that the investigation was defective, Meraz has not shown how its defects prejudiced him.[4]" (Appellate Court Decision, pp. 23-24.)

DISCUSSION

I

*Propriety of Entertaining Writ Petition*

Generally, courts of appeal will not review by means of a writ a trial court's order overruling a demurrer in its entirety. (See, e.g., *Babb v. Superior Court* (1971) 3 Cal.3d 841, 851.) However, appellate courts have issued writs when a trial court has erroneously overruled a demurrer sought on the basis of a statute of limitations, reasoning in such cases the aggrieved party is unreasonably compelled to go through trial

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**4** "At oral argument, Meraz asserted that the Board had acted unlawfully because a member of the Board allegedly deferred the determination of the credibility of witnesses to the ALJ. However, as Meraz acknowledged, he did not make this argument in his briefs. Such an argument may not be advanced for the first time at oral argument. (*Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 38, fn. 2.)"

and appeal, particularly when the petitioning party identifies a legal issue of first impression. (E.g., *Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 320-321; *Amie v. Superior Court* (1979) 99 Cal.App.3d 421, 424.)

This case fits within the exception. If the City is correct as to its res judicata claim, Meraz's entire action is barred. It would be unreasonable to require the City to proceed through trial and appeal to vindicate this defense. We thus proceed to hear the City's petition on its merits.

II

*Res Judicata*

The City argues Meraz's action is barred by res judicata. We agree.[5]

"'In its primary aspect, res judicata operates as a bar to the maintenance of a second suit between the same parties or parties in privity with them on the same cause of action.' On the other hand, if the causes of action in the second proceeding are not the same as those asserted in the prior litigation, then the judgment in the prior proceeding does not constitute a bar to the subsequent proceeding. 'Unless the requisite identity of causes of action is established, however, the first judgment will not operate as a bar.'

"For purposes of identifying a cause of action under the doctrine of res judicata, 'California has consistently applied

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[5] Because this issue is dispositive, we do not address the City's other grounds for relief.

the "primary rights" theory, under which the invasion of one primary right gives rise to a single cause of action.' But '. . . the "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.'" (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340-341, citations and fn. omitted.)

California courts have consistently held a terminated employee's claim of discrimination implicates the same primary right, and thus the same cause of action, as a claim of wrongful employment termination. This is because the primary right is the right to continued employment. (*Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 990-992; *Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 899-901; *Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1474-1477.) Accordingly, Meraz's complaint is barred unless he satisfies an exception to the rule of res judicata. (See, e.g., Rest.2d Judgments, §§ 20, 26.)

Meraz claims his action is not barred because he could not have raised his claim of discrimination in his earlier action. He asserts the hearing officer in the administrative hearing refused to allow him to conduct discovery regarding discriminatory treatment. As a result, Meraz alleges, he was unaware of the City's disparate treatment and did not discover it until after the Board denied his appeal from his termination. At that point, he claims, he learned the City had discriminated

against him based on his race by treating him differently than other police officers and by failing to follow the City's policies and practices regarding the investigation of a complaint and the termination of an employee.

Although we assume these allegations to be true, they do not exempt Meraz's complaint from the bar of res judicata. "Where the court prevents the litigation of matters which inhere in the cause of action, on the ground that they are not pleaded, plaintiff's remedy is either to seek to amend or to have the ruling, if erroneous, corrected by appropriate proceedings for review. An erroneous judgment is as conclusive as a correct one." (*Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 640.)

More recently, we commented on this same point: "'[U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. *A party cannot by negligence or design withhold issues and litigate them in consecutive actions.* Hence the rule is that the prior judgment is *res judicata* on matters which were raised or could have been raised, on matters litigated or litigable. In *Price*

*v. Sixth District* [*Agricultural Assn.*] [(1927)] 201 Cal. 502, 511, this court said: "But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result . . . ." (*Warga v. Cooper* (1996) 44 Cal.App.4th 371, 377-378, second italics added, other italics in original.)

Because being free from discriminatory treatment was part of his primary right to his claim of continued employment, Meraz could not split that claim and bring a second action for discrimination even though the split arose from the hearing examiner's actions. Meraz bore the duty to attack the administrative law judge's ruling on his discovery request directly.

Meraz argues there could be no bar because he did not know of any discriminatory treatment against him until after the administrative hearing. This argument is irrelevant. Because of the long-standing rule against splitting claims, Meraz had an obligation to pursue any and all possible theories and remedies available to redress the alleged violation of his primary right to continued employment. Indeed, that is exactly what his counsel at the administrative hearing attempted to do. He sought discovery of discriminatory treatment even though, as Meraz alleges here, he had no knowledge of any such treatment at that time.

It was incumbent upon Meraz to attack the administrative law judge's ruling directly to prevent the rule against splitting claims and res judicata from operating against him following a final judgment. His failure to do so results in res judicata barring him from raising the discrimination theory anew.

DISPOSITION

The City's petition is granted. The order of the trial court overruling the City's demurrer to Meraz's first amended complaint is reversed. We remand this matter to the trial court with directions to dismiss the complaint with prejudice. We award the City its costs incurred in this original proceeding.

NICHOLSON, Acting P.J.

We concur:

CALLAHAN, J.

HULL, J.